

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 602

FILED

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CHARLES ELMORE GROPLEY
CLERK

J. D. CHALK, COMMISSIONER, DIVISION OF GAME AND INLAND FISHERIES, DEPARTMENT OF CONSERVATION AND DEVELOPMENT OF THE STATE OF NORTH CAROLINA; E. B. KUGLER, ASSISTANT TO COMMISSIONER, DIVISION OF GAME AND INLAND FISHERIES, DEPARTMENT OF CONSERVATION AND DEVELOPMENT OF THE STATE OF NORTH CAROLINA; J. A. BRADSHAW, GAME AND FISH PROTECTOR OF DISTRICT No. 1, STATE OF NORTH CAROLINA; J. H. LONGSHORE, SPECIAL GAME AND FISH PROTECTOR OF THE STATE OF NORTH CAROLINA; SEAMAN S. WHITTAKER, COUNTY GAME AND FISH PROTECTOR OF HENDERSON COUNTY, NORTH CAROLINA; C. N. MEASE, REFUGE SUPERVISOR, STATE OF NORTH CAROLINA,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

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No. 602

J. D. CHALK, COMMISSIONER, DIVISION OF GAME AND INLAND
FISHERIES, DEPARTMENT OF CONSERVATION AND DEVELOP-
MENT OF THE STATE OF NORTH CAROLINA, ET ALS.,

vs.

Petitioners,

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The petition of J. D. Chalk, Commissioner, Division of
Game and Inland Fisheries, Department of Conservation
and Development of the State of North Carolina; E. B.
Kugler, Assistant to Commissioner, Division of Game and
Inland Fisheries, Department of Conservation and Devel-
opment of the State of North Carolina; J. A. Bradshaw,
Game and Fish Protector of District No. 1, State of North
Carolina; J. H. Longshore, Special Game and Fish Protec-
tor of the State of North Carolina; Seaman S. Whittaker,
County Game and Fish Protector of Henderson County,

North Carolina; and C. N. Mease, Refuge Supervisor, State of North Carolina, respectfully shows to this Honorable Court:

A. Summary Statement of Matter Involved.

1. Decree Below.

By this petition the defendant officials of the State of North Carolina seek a review of the decision of the United States Circuit Court of Appeals for the Fourth Circuit rendered August 30, 1940, which affirmed the decree of the District Court forever enjoining the officials of the State of North Carolina from enforcing the laws of that State with respect to deer having their habitat upon the Pisgah National Game Preserve in western North Carolina.

The decision of the United States Circuit Court of Appeals for the Fourth Circuit is reported in 114 Federal 2d. 207, and appears on page 311 of the Record.

2. Pleadings.

This suit was begun by the United States on March 13, 1939, by the filing of a complaint in the District Court of the United States for the Eastern District of North Carolina (R. 1). The defendants, petitioners herein were the Game Commissioner of North Carolina, and game officials under him.

The complaint alleged (R. 3, Pgh. III) that North Carolina had, by Ch. 17, North Carolina Public Laws of 1901, consented to the acquisition by the United States of such lands in North Carolina as in the opinion of the Federal Government might be needed for the establishment of a national forest reserve, and to the making of civil and criminal laws for the management and protection thereof; and that (R. 3, Pgh. IV) the lands had been acquired under the Weeks Act of March 1, 1911, Ch. 186, 36 Stat. 961. It al-

leged that by the Act of Congress of August 11, 1916, 39 Stat. 476, and by Presidential Proclamation (R. 3, Pgh. VI), a part of the Pisgah National Forest had been set aside as the Pisgah National Game Preserve. It also alleged (R. 3, Pgh. VII) that by Ch. 205, North Carolina Public Laws of 1915, the General Assembly of North Carolina had consented that Congress might make or authorize all such rules and regulations as the Federal Government should determine to be needful in respect to the game on said lands, and that (R. 4, Pgh. VIII) certain Acts of Congress authorized the Secretary of Agriculture to make such rules and regulations as would insure the protection of the forest from damage, and would protect the game on said land.

The complaint further alleged (R. 5, Pgh. XI) that said lands were being severely damaged by the deer thereon.

The purpose of the suit was to permanently enjoin defendants from enforcing the State game laws with respect to said deer against officers and employees of the United States Forest Service, and others hunting or killing deer under authority of the Secretary of Agriculture, the plaintiff claiming that it had the right to reduce the number of deer ranging or found on the Preserve, regardless of State laws (R. 12, 13).

Plaintiff also prayed (R. 13) for judgment declaring the State game laws to be violative of Article IV, Section 3, Clause 2, of the United States Constitution, insofar as applied to said deer, and for a declaration that the United States has sole and exclusive jurisdiction over the deer on said Preserve.

After the suit was begun, and on September 9, 1939, (R. 86, 267, 268) the Secretary of Agriculture issued his "Determination and Authorization" in which he found that the Preserve was being seriously damaged by the deer, and authorized the United States Forest Service and hunters

operating under his general regulations published August 15, 1936, to hunt and kill deer on the Preserve from October 1, 1939, to February 1, 1940. (Under State law the deer season ended December 31, 1939.)

The Secretary also authorized his employees to trap, capture and ship live deer off the Preserve at any time during the balance of the year 1939 and the year 1940. (Such acts are prohibited by State law without a permit from the Game Commissioner of North Carolina.)

By agreement of Counsel, the plaintiff was permitted to file an amended complaint on October 5, 1939, without prejudice. It differed from the original only in that it alleged the making and issuing of the Secretary's "Determination and Authorization" (R. 32, 43, 50).

The defendants' answer to the amended complaint denied that the Preserve was being seriously damaged by the deer (R. 53, Pgh. 11) and alleged that the effect of the browsing of the deer on the Preserve was inconsequential and not appreciable (R. Mid. 59).

They averred that repeated Acts of Congress require the United States Forest Service to cooperate with State game officials in the enforcement within the national forests of State game laws, and that the Federal employees assigned to duty on the Pisgah had failed and refused to cooperate with the game officials of the State of North Carolina, and had ignored and violated State game laws (R. Mid. 54).

The answer alleged that in consenting to the acquisition by the United States of lands in the western portion of North Carolina for forest reserves, the State of North Carolina retained its concurrent civil and criminal jurisdiction over said lands, as appears from Ch. 17 of the Public Laws of North Carolina, Session of 1901 (Appendix, uu. 26-27) and that the game laws of North Carolina are in full force and effect over said lands (R. 59-60).

The answer also alleged that the United States did not have exclusive jurisdiction over said lands (R. 60, Fourth), and denied that Ch. 205, North Carolina Public Laws of 1915 (Appendix, pp. 27-28) granted to the United States an exclusive jurisdiction over the game on the lands in the Pisgah National Forest, pointing out that in 1933 and in 1939 the General Assembly of North Carolina had construed its said Act of 1915 and had enacted and declared that nothing in said Act of 1915 should be taken to abrogate the vested right of the State of North Carolina to collect hunting license fees from persons hunting upon said lands, and that said Act of 1915 should not be taken as conveying the State's ownership of the wild life thereon or permitting the hunting thereof except in accordance with the general game laws of said State (R. 60, Fifth).

As to the "Determination and Authorization" of the Secretary of Agriculture, dated September 9, 1939, the answer of the defendants pointed out that this paper was not authorized by any Act of Congress, nor was it a "general" rule or regulation within the Act of August 11, 1916, Ch. 313, 39 Stat. 476, Title 16, U. S. Code, Sec. 683, (Appendix, p. 35) and that said "Determination and Authorization" was contrary to the facts and circumstances existing during the times referred to therein, and was not binding upon the defendants.

Upon the issues so framed, the cause proceeded to trial before District Judge Meekins and a jury on November 6, 7 and 8, 1939.

3. Brief Outline of the Evidence.

The Pisgah National Game Preserve consists of about 97,000 acres of rugged, mountainous land in Western North Carolina (R. 118). It is a part of the 150,000 acre Pisgah National Forest (R. 97, 118).

The deer on the Pisgah are locally migratory, and range on and off the Pisgah, their ordinary range being about 25 miles (R. 113, 135, 155, 156). The vegetation on the Preserve and Forest is very dense and thick, it being the luxuriant second growth of the Southern Appalachians (R. 147, 177, 215, 216, 217, 218, 220, 221).

Upon the issue whether the forest was being seriously damaged by the deer, the testimony was unanimous that during recent years there has been a marked decrease of the number of the deer on the Pisgah. The Government's witness, Ruff, estimated that in 1935 there were about 7100 or 7200 deer on the Preserve (R., top 125), and that at the time of the trial the number was over 5,000, a decrease of approximately 30%, and that this number would annually produce about 1250 surviving young (R. 125).

For three years, 1936, 1937 and 1938, the United States held public hunts on the Preserve (R. 83, 84; 139-143). These hunts were held in accordance with State law (R. 138-141) and extended over a period of only four weeks (R. 38-41). The State open season for deer was October 1 to January 1 (R. 143). On these hunts the United States allowed each hunter to take only one deer (R. 142). State law allowed each hunter three deer a season (R. 142). Notwithstanding the natural increase and the Federal restrictions in addition to those imposed by State law, these three hunts and the trapping operations reduced the deer to an estimated number of 5,000.

The Government employee Rachford testified (R. 105) that the deer were "badly" damaging the Preserve. He had little acquaintance with the Preserve (R. 110-115). Like testimony was given by the Government employee Ruff (R. 118-122, 251-257). Ruff's testimony was based largely on six "study plots," (R. 119-120) each about 3 acres in extent (R. 127). These plots were in or adjacent to open

field areas typical of only two per cent of the Preserve, where deer naturally tend to concentrate (R. 181-182, 198-199).

Twelve witnesses for the State, well acquainted with the Preserve for many years, testified that the deer were not damaging the Preserve (R. 145-222). Like testimony was given by two able and trained forestry experts, familiar with the Preserve, whose character, ability, and qualifications were not questioned (E. L. Meadows, R. 178-186; Ross O. Stevens, R. 195-202). Meadows testified (R. 188) that the Preserve would support "two or three" times as many deer as were on the Preserve at the time of the trial, and Stevens testified (R. 199) that it would support "a much larger" number of deer without damage.

After the close of all the evidence, the District Judge, being of opinion that the case was not one for a jury, dismissed the jury, and subsequently signed Findings of Fact, without rendering any opinion (R. 267).

There was no evidence that, and neither the Secretary of Agriculture nor the District Judge found that the deer on the Preserve could not be reduced by means and within the times allowed by State law.

The District Judge refused to permit the defendant Chalk to relate his efforts to cooperate with the Federal Forest Service in the handling of deer on the Preserve (R. 138) but he was allowed to testify that in 1937, at the request of the Forest Service, the State Board, of which he was Chairman, promulgated a regulation whereby doe deer might be taken in the hunts on the Preserve, a regulation still in effect (R. 139). Elsewhere in North Carolina it is unlawful to take doe deer.

The State game laws, summarized in the Appendix, authorize the State game officials to permit the killing or trapping of deer damaging land or the growth thereon. The

United States offered no evidence that it had ever applied for or been refused such a permit, nor did it show that it had ever requested the cooperation or aid of the State in reducing the deer on the Preserve.

The amended complaint shows (R. 41) that since 1927 the United States has trapped and shipped 2,400 deer out of North Carolina. The defendant Chalk testified (R. 142-143) that, generally, there were few deer on the Federal lands in Western North Carolina, and that he had requested that other Federal lands in the State be stocked before any deer on the Pisgah Preserve should be taken out of the State. It was alleged by the United States (R. 43, Paragraph 17) and admitted by defendants (R. 57, Paragraph 17) and the Court found (R. 70, Paragraph 12) that the deer were worth \$25.00 each.

4. Findings and Conclusions of District Judge.

The District Judge found (R. 67, Finding 2) that the Preserve was being "severely damaged" by the deer, and (R. 68, Findings 3 and 4) that the Determination of the Secretary of Agriculture to that effect was sustained by the evidence.

He further found (R. 69, Finding 8) that petitioners had threatened and were threatening to enforce the State game laws against the members of the United States Forest Service and hunters authorized by the Secretary of Agriculture to hunt and kill said deer.

He concluded (R. 70, Concls. 1 and 2) that the United States, under regulations of the Secretary of Agriculture, was entitled to reduce the deer on the Preserve by authorizing Federal employees or others to hunt and kill said deer and to remove their carcasses, and that Federal employees could trap, capture, and transport or ship live deer, all "without regard to State game laws and without interference from defendants."

5. Decree and Injunction.

The District Judge thereupon (R. 72-3) permanently enjoined the defendants and all persons acting under their authority from enforcing or attempting or threatening to enforce the State game law against, and from arresting or prosecuting or attempting or causing the arrest or prosecution of any of the officers, agents or employees of the United States or any other person, on account of any act done or which may be done under the authority of and in executing the rules and regulations of the Secretary of Agriculture for reducing the number of deer on said Preserve.

The District Court also decreed that (R. 73, Pgh. 4) as applied to said deer, the State game laws "are violative of Clause 2, Section 3, Article IV of the Constitution of the United States," and the laws and regulations thereunder, and further decreed that (R. 73, Pgh. 5) the United States has "sole and exclusive jurisdiction over" said deer.

6. Rulings of Circuit Court of Appeals.

The defendants appealed to the Circuit Court of Appeals for the Fourth Circuit (R. 74), which affirmed the finding of the District Judge that the deer were "severely damaging" the Preserve (R. 316), and held that *Hunt v. United States*, 278 U. S. 96, controlled this case, and that under it the United States had the right to reduce the number of deer without regard to State laws (R. 317-318).

The Circuit Court of Appeals further held (R. 317) that Ch. 205, North Carolina Public Laws of 1915, "ceded exclusive jurisdiction over the control of wild life in the Pisgah Game Preserve to the Federal Government," and that the Act of August 11, 1916, Ch. 313, Section 1, 39 Stat. 446, 476, T. 16, U. S. Code, Section 683, authorizing the establishment of game preserves in national forests acquired

under the Weeks Act was an acceptance thereof (R. 314-315), and that such acceptance was shown by the debate in the Senate on the Act of 1916. It held that after such cession "the State could not, by the passage of any general game law, in any way affect the right of the plaintiff under the cession" (R. 317).

Upon these grounds, it stated that the granting of the permanent injunction was correct (R. 318).

The State Act of 1915 affects not only the Preserve but all the lands in Western North Carolina acquired by the United States under the Weeks Act, of which the entire 150,000 acres in the Pisgah National Forest is merely a part.

The decision of the Circuit Court of Appeals is, therefore, that the State of North Carolina has no jurisdiction over the game on any of the extensive national forests in the western portion of that State.

B. Statutes Involved.

The statutes involved are set forth or summarized in the Appendix, and it is believed that the relation of the principal State and Federal statutes herein involved are adequately indicated in Question I, *infra*.

C. Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 938, T. 28, U. S. Code, Sec. 347 (a).

The decree of the Circuit Court of Appeals was entered August 30, 1940 (R. 318). This petition was filed November 30, 1940.

In *Dodge v. Woolsey*, 59 U. S. (18 How.) 331, 358, this Court, with respect to its jurisdiction to adjudicate and

decide questions of power between the States and the Nation, said:

“A supreme tribunal has been provided which has hitherto, by its decisions, settled all differences which have arisen between the authorities of the States and those of the United States.”

And in *Texas v. White*, 74 U. S. (7 Wall.) 700, 725, the Court said that “the preservation of the States, and the maintenance of their Governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government,” a statement often repeated in the later decisions of the Court.

Certiorari was granted in *Pennsylvania v. Williams*, 294 U. S. 176, “to resolve questions of public importance growing out of the rival claims of” State and Federal authorities.

The traditional and only final and effective settlement of disputes between the States and the Nation with respect to power and jurisdiction over the National Forests and other Federal areas is by the decision of this Court. Recent instances in which this Court has noted and exercised its jurisdiction in such cases are:

Superior Bath House Co. v. McCarroll, No. 180, Oct.

Term, 1940, probable jurisdiction noted October 14, 1940, 61 S. Ct. 23;

Buckstaff Bath House Co. v. McKinley, 308 U. S. 358, 361;

Bowen v. Johnston, 306 U. S. 19;

Collins v. Yosemite Park and Curry Co., 304 U. S. 518;

Rainier Nat. Park Co. v. Martin, 302 U. S. 661;

Silas Mason Co. v. Tax Comm. of Washington, 302 U. S. 186;

James v. Dravo Cont. Co., 302 U. S. 134.

This Court has jurisdiction to examine evidence, and will reverse the findings of the District Court, though concurred in by the Circuit Court of Appeals, where only a "flimsy showing" of the existence of the facts found is made, if the case is distinguished by a general importance warranting reexamination by the Supreme Court to determine the quality and quantity of evidence which should be required for a particular important purpose. *Beyer v. Le Fevre*, 186 U. S. 114, 119. There, the question was how much evidence should lawfully be required to set aside a will. Here, the question is how much evidence of real damage to the forests should be required by the courts before approving the act of the Forest Service in setting State jurisdiction at naught.

In *United States v. McGowan*, 290 U. S. 592, certiorari was granted with respect to a dispute between the State of Washington and a tribe of Indians as to the latter's fishing rights, where the case turned entirely on an appreciation of the evidence and the findings of the District Court had been affirmed by the Circuit Court of Appeals. *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, page 608, note 81.

D. Questions Presented.

The questions presented by this petition are:

I

The State of North Carolina consented that the United States might acquire lands in its Western portion to establish forest reserves, but reserved to itself a concurrent civil and criminal jurisdiction over such lands (N. C. Public Laws, 1901, Chapter 17). A prior Act of Congress preserved the jurisdiction of the States, both civil and criminal, over lands within their borders comprising the public forest reserves (30 Stat. 34, 36, 16 U. S. Code, Sec. 480). The lands in question were acquired by the United States

for a national forest under the Weeks Act (36 Stat. 961) which expressly preserved the jurisdiction of the State (36 Stat. 963, 16 U. S. Code, Section 480). Acts of Congress prior and subsequent to 1901 provided that Federal forest officials should cooperate with State game officials in enforcing State game laws in national forests (30 Stat. 1074, 1095, 34 Stat. 1256, 1269; 35 Stat. 251, 259, 16 U. S. Code, Sec. 553). In 1915 the State of North Carolina consented (North Carolina Public Laws of 1915, Chapter 205) that Congress might make or authorize "all such rules and regulations as the Federal Government shall determine to be needful in respect to" the game on North Carolina lands acquired by the United States under the Weeks Act, the act of consent not providing that such power should be exclusive. In 1916 (39 Stat. 446, 476, 16 U. S. Code, Section 683) Congress authorized the establishment of game preserves on lands acquired under the Weeks Act, and the Pisgah National Game Preserve was established thereunder on the North Carolina lands above referred to. Under such circumstances, did the State Act of 1915 grant to the United States an exclusive jurisdiction over the deer on said lands?

II.

Under such circumstances, if the State Act of 1915 be construed to grant such exclusive jurisdiction, was such jurisdiction accepted by the United States, there being no repeal of any of the Acts of Congress referred to in Question I?

III

The State and Federal laws referred to above in Question I being in force, in 1933 the General Assembly of North Carolina enacted and declared that its said Act of 1915 should not be "construed to abrogate the vested rights of the State of North Carolina" to collect fees for licenses for hunting and fishing on said lands (N. C. Laws of 1933,

Chapter 537, Section 2); and in 1939 it enacted and declared (N. C. Public Laws of 1939, Chapter 79) that the State Act of 1915 should not be construed to convey the State's ownership of the wild life on said lands, or to permit the hunting, trapping, or transporting thereof, except in accordance with the State Game Law (N. C. Public Laws of 1935, Chapter 486). Should such legislative constructions of the Act of 1915 be rejected, particularly in view of the Acts of Congress referred to in Question I?

IV.

Was the Circuit Court of Appeals clearly wrong in affirming the finding of the District Judge that the Preserve was being severely damaged by the deer thereon?

V.

If not, the State and Federal laws above referred to being in force, and there being neither evidence nor finding of an emergency, whether the Circuit Court of Appeals erred in affirming the permanent injunction against defendants, petitioners herein, when it was not shown that the State game laws prevented or would prevent or seriously interfere with the desired reduction of the deer, or that the United States Forest Service had fairly and reasonably endeavored to reduce the number of deer on said Preserve by means and within the time allowed by the laws of North Carolina, or through cooperation with the State Game Officials?

VI.

Whether the United States Forest Service has the right or power, over the objections of State Game Officials, to ship or transport captured live deer from said Preserve to other States on the ground that said deer were damaging the Preserve, in the absence of proof that they could not

readily be removed from said Preserve and turned over to said game officials to stock other remote areas in the State.

E. Reasons for Granting the Writ.

I.

In holding (R. 317) that North Carolina Public laws of 1915, Chapter 205 (Appendix, pp. 27-28), ceded to the United States an exclusive jurisdiction over the game on the Federal lands in Western North Carolina acquired under the Weeks Act, the Circuit Court of Appeals has decided an important question of jurisdiction and power between the State and the Nation. The consent to the making of rules and regulations in respect to game which the State gave by Chapter 205 did not purport to be and was not in terms a grant of exclusive jurisdiction; but by implication the Circuit Court of Appeals has inserted into the law the words "cedes exclusive jurisdiction", contrary to the canon of construction "that the rights of sovereignty are never to be taken away by implication," *Re Kelly*, 71 Fed. 545, 552, a canon apparently approved in *Fort Leavenworth Ry. Co. v. Lowe*, 114 U. S. 525, 538.

The State and Federal laws referred to in Question I, *supra*, set forth in the Appendix, preserve the jurisdiction of the State over the lands in question. The Acts of Congress there referred to show that for over forty years it has been and is now the settled policy of the United States to preserve State jurisdiction in the national forests, both civil and criminal. These State and Federal laws are *in pari materia* with Chapter 205, which should not be given a construction that would deprive the State of any part of the jurisdiction thus preserved, particularly when such construction is unnecessary, and is reached by reading the words "cedes exclusive jurisdiction" into the enactment of 1915. Chapter 205 has not been construed by any other

judicial decision, and the important question of its meaning and effect should be settled by this Court. The cases showing the jurisdiction and special function of this Court to decide such issues are cited in the Jurisdictional Statement, *supra*.

II.

If Chapter 205, North Carolina Public Laws of 1915, be construed to cede such exclusive jurisdiction, it is believed that the Circuit Court of Appeals erred in holding that the Act of August 11, 1916, Chapter 313, Section 1, 39 Stat. 446, 476, 16 U. S. Code, Section 683 (R. 314-315), constituted an acceptance of an *exclusive* jurisdiction. That Act simply authorized the President to set aside game preserves on lands acquired by the United States under the Weeks Act, and forbade hunting in such preserves except under "general" rules and regulations of the Secretary of Agriculture. The Act of 1916 is not believed sufficient to support the conclusion that Congress thereby abandoned its forty year policy to preserve State jurisdiction in the National Forests and to require Federal Forest Officials to cooperate and aid in the enforcement of State game laws.

The Circuit Court of Appeals also erred in holding that the debate (R. 315) in the Senate on the passage of the Act of August 11, 1916, showed acceptance of a grant of *exclusive* jurisdiction. True, it shows an acceptance of the State Act of 1915; but not a word of the debate shows that it was thought that the Act ceded, or that the United States intended to accept, an *exclusive* jurisdiction over game on the lands in this State. The debate shows that Senator Overman, the author of the Amendment, drew it originally to apply only to the Pisgah National Game Preserve, and that the Agricultural Committee broadened it to include all of the lands acquired under the Weeks Act, including lands in "Virginia, Georgia, Tennessee, and New Hampshire and the White Mountains" (Appendix, pp. 37-

38). The debate does not show that in 1916 the other States mentioned had enacted laws similar to the North Carolina Act referred to. The Act of August 11, 1916 was a general enactment, and did not depend upon the State Act of 1915. The debate nowhere shows an intention to disturb or depart from the settled policy of Congress referred to above. The meaning and effect of these State and Federal statutes is a matter of importance to this State and to the nation, and to all other States in whose borders are located national forests acquired under the Weeks Act, and should be settled by the decision of this Court.

III.

In 1933 (N. C. Public Laws, 1933, Chapter 537, Section 2, Appendix, p. 29) the General Assembly of North Carolina enacted that the State Act of 1915 should not be construed to deprive the State of its *vested* right to collect, under general laws applicable to the whole State, license fees from hunters on the lands affected by the Act of 1915; and in 1939 (N. C. Public Laws, 1939, Ch. 79, Appendix, pp. 30-31) the General Assembly of the State enacted that its Act of 1915 should not be construed to convey the State's ownership of the game on said lands or to permit hunting, trapping, or transporting the game thereon, except in accordance with the game laws of North Carolina.

This legislative construction should be accepted. Under somewhat similar circumstances, this Court accepted a like construction by the Supreme Court of Washington in *Silas Mason Company v. Tax Commission of Washington*, 302 U. S. 186, 206, and in this respect the decision below is probably in conflict with that decision. The construction of the General Assembly is in accordance with the settled policy of Congress, above referred to, and is supported by the State and Federal laws, referred to in Question I, *supra*, preserving the jurisdiction of this State over North Carolina lands acquired under the Weeks Act. The decision of

the Circuit Court of Appeals is in conflict with the construction of the General Assembly of North Carolina and the question presented is of importance to the State and to the nation and should be settled by this Court.

IV.

The question whether the Circuit Court of Appeals was clearly wrong in affirming the finding of the District Judge that the deer were severely damaging the Preserve is one of great importance to the State of North Carolina. It believes that the evidence clearly shows that the Preserve had not been and was not likely to be appreciably damaged by the deer. The question is also of great importance to every State in the Union. On the average the United States owns 20.74% of the lands in the States, its ownership ranging from 82.67% in Nevada to 0.1% in Iowa. House Document No. 111, 76th Congress, First Session, entitled, "Federal Ownership of Real Estate and its Bearing on State and Local Taxation."

In *James v. Dravo Contracting Co.*, 302 U. S. 134, 147, and in *Silas Mason Co. v. Tax Comm. of Washington*, 302 U. S. 186, 208, this Court referred to the increasing importance of preserving State jurisdiction "as the activities of the Government expand and large areas within the States are acquired." If the highly theoretical and imaginative evidence given by two Forest Service employees in this case is to be deemed sufficient to establish "severe damage," the Forest Service can seize and retain jurisdiction of the wild life on every acre of its lands in States where deer or other game animals have their habitat. The highly important question of the quantum and quality of evidence to be required before the Forest Service may be permitted to deprive the States of their jurisdiction should be settled by the decision of this Court.

V.

There was neither evidence nor finding of an emergency requiring the prompt removal of the deer, nor that the State Game laws would prevent or seriously interfere with the reduction of the number of deer desired by the Forest Service. There was no evidence or finding that the officials of the Forest Service had endeavored to make such reduction by means and within the time allowed by State law, or that the Forest Service had made any attempt to secure the aid and cooperation of State game officials in making such reduction. The District Judge refused (R. 136) to permit the State Game Commissioner to relate his efforts to cooperate with the Forest Service officials in the handling of the deer on the Preserve. Whether, under such circumstances, State game officials should be permanently enjoined from enforcing State game laws is an important question that this Court should decide.

VI.

The game in this country is the property of the States, *Geer v. Connecticut*, 161 U. S. 519, 528, even where it is on Federal lands, *Ward v. Race Horse*, 163 U. S. 504. There was neither evidence nor finding that it was necessary for the Forest Service to ship to other States live deer captured on the Pisgah National Game Preserve, nor that they could not readily be turned over to State game officials when captured by the Forest Service. The 2,400 live deer shipped out of this State by the Forest Service since 1927, without the State's consent, were worth \$60,000.00. The Forest Service contends that of the 5,000 which it estimates are on the Preserve, 3,500 should be removed. If shipped to other States, this would deprive North Carolina of prop-

erty worth \$87,500. It is a matter of importance to the State that it not be deprived of its game, which freely ranges on and off the Federal lands in question; and whether, under the circumstances of this case, the Forest Service can convert to their own use live deer belonging to North Carolina by shipping them to other States is a question that should be decided by this Court.

VII.

The Circuit Court of Appeals held, as one of its grounds of decision, that *Hunt v. United States*, 278 U. S. 96, was "controlling" (R. 316).

In the *Hunt* case, Arizona officials were enjoined from arresting or prosecuting United States forest officials or employees for killing mule deer under an order made by the Secretary of Agriculture for the protection of the Kaibab National Forest and the game preserve coterminous with it from the destructive effects of overbrowsing by the animals. The damage was serious and extensive. It was recognized by both State and Federal officials and both had made unsuccessful efforts to cope with the threatened disaster, admitted by all.

Upon the facts, we point out that in the *Hunt* case:

(1) The area involved about 349,760 arid acres, from 5,000 to 9,000 feet in elevation, with only sparse growth, whereas the Pisgah is well watered and has a lush and often almost impenetrable growth. (Government's Exhibit 3, R. 271; Cogburn, R. 177.)

(2) The mule deer, numbering about 26,000, were very large animals with great appetites, ranging in herds, whereas the white-tail deer are small, eat comparatively

little, and do not range in herds. The mule deer on the Kaibab were poor and starving, the deer in this case fat and well-nourished (R. 155, 161, 167, 189, 204, 207, 212).

(3) On the Kaibab there was about one deer to every thirteen acres, on the Pisgah about one deer for every thirty acres (R. 123).

(4) On the Kaibab the topography was such that the deer never left its bounds, whereas in the Pisgah the deer roam at will on and off the Preserve and Forest for distances as great as thirty or forty miles (R. 135, 136, 161, 184).

(5) On the Kaibab the admitted damage was so great that the sparse forest growth was imminently threatened with total destruction, whereas on the Pisgah the evidence is overwhelming that the deer have not caused, and are not threatening to cause, any appreciable damage. In all the history of the Southern Appalachians, there has never been an instance of forest damage by deer.

In *Beyer v. LeFevre*, 186 U. S. 114, 119, this Court referred to the rule that findings concurred in by two courts would ordinarily be accepted, but said that "there has always been recognized the right and the duty of this Court to examine the record, and if it finds that the conclusions are wholly unwarranted by the testimony, it will set the report or verdict aside and direct a re-examination. And after having carefully examined the record in this case, we are constrained to the conclusion that there is no testimony which justified the answer returned to the second question. On the contrary, if a will is set aside upon such a flimsy showing as was made of undue influence, few wills can hope to stand."

So, here, if State sovereignty can be "set aside upon such a flimsy showing" of damage as was presented in this case, the United States Forest Service can assume jurisdiction in every national forest in the country having big game, notwithstanding the long established policy of Congress to preserve State game jurisdiction in such areas.

At the trial of this case, counsel for the Government (R. 266) argued that the Determination of the Secretary of Agriculture was conclusive of the question of damage and bound both the Court and the defendants. Thereupon, being impressed by the Secretary's finding and the Government's argument as to its effect, the District Judge reversed (R. 267) his earlier ruling excluding the Determination from evidence, and found (R. 68) that the Secretary's Determination of damage was sustained by the testimony of a "host of witnesses."

The only testimony of substantial damage was given by two employees of the Forest Service. Twelve other witnesses testified that the deer had inflicted no appreciable damage to the Preserve. A large number of disinterested witnesses, familiar with the area for many years, testified to the absence of any appreciable damage; and two of the State's witnesses so testifying were able and trained forestry experts, familiar with the Preserve, whose character, ability, and qualifications were not questioned.

The *Hunt* case is not controlling for the further reason that the Arizona Enabling Act, 36 Stat. 557, 569, contained a provision that the people of Arizona "disclaim all right and title to the unappropriated and ungranted public lands", and reserved (573) to the United States the national forests in Arizona. When Arizona was admitted to the Union, the Kaibab was an established National Game Preserve, over which the United States had and retained

exclusive jurisdiction, 27 Stat. 1064; 34 Stat. 607; 34 Stat. 3263; 35 Stat. 2192. See, also, 36 Stat. 2496, and 40 Stat. 1175.

In the instant case, the Pisgah was acquired under the Weeks Act, and the jurisdiction of the State over the land and game was preserved by the Federal and State enactments above referred to.

In the *Hunt* case the necessity of reducing the deer was admitted. It was also agreed that trapping, hunting and driving the deer had been tried without success. Killing on a large scale was immediately imperative and the only possible mode of reduction. On the Pisgah, trapping and removal is feasible. The United States alleges (R. 41, Paragraph XVI) that it has trapped and shipped to other States 2,400 of the Pisgah deer. The State Game Commissioner testified that (R. 141-143) he objected to the shipment of Pisgah deer to other States, and that what he desired was that any deer captured on the Pisgah should be used to populate or repopulate other areas in the State. The State has not demanded and does not demand that the Forest Service make no reduction in the number of deer on the Pisgah. It has pointed out and contended that if, during 1936 to 1938, inclusive, the Forest Service has not greatly restricted the Pisgah hunting to one-third of the season limit and one-third of the bag limit of State law, it could have reduced the deer by 5,000 or 6,000 instead of by 2,000. It has not objected to the trapping and removal of deer by the Forest Service, provided the deer be not removed to other States so long as they are required to stock underpopulated areas in North Carolina. Indeed, the State has offered and offers to assist in such trapping and removal, at its own expense, if that be acceptable to the Forest service.

In view of these facts, and of the State's undoubted ownership of the deer (*Geer v. Connecticut*, 161 U. S. 519,

528; *Ward v. Race Horse*, 163 U. S. 504, 507, 514) surely this is not a proper case for a permanent injunction against the defendants, but rather one for the application of the Acts of Congress, set forth in the Appendix, requiring the Forest Service to aid and cooperate with State game officials in the enforcement of the game laws of the State. At least under the facts of this case, the courts should, before issuing such an injunction, require the Forest Service to show not only an immediate emergency, but also that reasonable efforts have been made to secure the cooperation of the State game officials, and that such cooperation was denied. The courts should also require the Forest Service to show the necessity of shipping North Carolina deer to other States, and if such proof be not made, should at least recognize the property of the State in the deer by providing that any live deer trapped on the Preserve by the Forest Service should be turned over to the State game officials and not shipped to other States. The *Hunt* case clearly does not hold otherwise. The Circuit Court of Appeals has misapplied and greatly extended the effects of that case; it has applied it to a vastly different state of facts, and it is a matter of great importance to North Carolina, and to every game State in the Union, to know whether the holding is applicable to the facts appearing in this case.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the Seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 4627, "J. D. Chalk, Commissioner of Game and Inland Fisheries, et als., Appellants, vs. United States of America, Appellee," and that the said decree of said court may be re-

versed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated November 23, 1940.

HARRY McMULLAN,
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Raleigh, N. C.

LEE OVERMAN GREGORY,
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Counsel for Petitioners.

APPENDIX.**State Laws Involved.****1.**

The lands in the Pisgah National Game Preserve were acquired by the United States pursuant to State consent given by Chapter 17, Public Laws of North Carolina of 1901, page 157, which is as follows:

"AN ACT TO GIVE CONSENT OF THE STATE OF NORTH CAROLINA TO THE ACQUISITION BY THE UNITED STATES OF SUCH LANDS AS MAY BE NEEDED FOR THE ESTABLISHMENT OF A NATIONAL FOREST RESERVE IN SAID STATE.

"Whereas, it is proposed that the Federal Government purchase lands in the high mountain regions of Western North Carolina and adjacent States, for the purpose of establishing there a National Forest Reserve which will perpetuate these forests and forever preserve the headwaters of many important streams, and which will thus prove of great and permanent benefit to the people of this State; and

"Whereas, a bill has been introduced in the Federal Congress providing for the purchase of such lands for said purpose; therefore,

"THE GENERAL ASSEMBLY OF NORTH CAROLINA DO ENACT:

"Section 1. That the consent of the General Assembly of North Carolina be and is hereby given to the acquisition by the United States by purchase, or by condemnation with adequate compensation, except as hereinafter provided, of such lands in Western North Carolina as in the opinion of the Federal Government may be needed for the establishment of such a national forest reserve in that region: Provided, that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the com-

mission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this act had not been passed.

"Section 2. That power is hereby conferred upon Congress to pass such laws as it may deem necessary to the acquisition as hereinbefore provided, for incorporation in said national forest reserve, such forest covered lands lying in Western North Carolina as in the opinion of the Federal Government may be needed for this purpose: Provided, that as much as two hundred acres of any tract of land occupied as a home by bona fide residents in this State at the date of the ratification of this act shall be exempt from the provisions of this section.

"Section 3. Power is hereby conferred upon Congress to pass such laws and to make or provide for the making of such rules and regulations, of both civil and criminal nature and provide punishment therefor, as in its judgment may be necessary for the management, control, and protection of such lands as may be from time to time acquired by the United States under the provisions of this act.

"Section 4. That this act shall be in force from and after its ratification.

"In the General Assembly read three times and ratified this the 18th day of January, A. D., 1901."

2.

In 1915 the General Assembly of North Carolina, by Chapter 205, North Carolina Public Laws of 1915, page 284, consented to the making of Federal rules and regulations in respect to game on Western North Carolina lands acquired under the Weeks Act, which is as follows:

"AN ACT TO GIVE THE CONSENT OF THE STATE OF NORTH CAROLINA TO THE MAKING BY THE CONGRESS OF THE UNITED STATES, OR UNDER ITS AUTHORITY, OF ALL SUCH RULES AND REGULATIONS AS IN THE OPINION OF THE FEDERAL GOVERNMENT MAY BE NEEDFUL IN RESPECT TO GAME ANIMALS, GAME AND NON-GAME BIRDS, AND FISH ON LANDS, AND IN OR ON THE

WATERS THEREON, ACQUIRED OR TO BE ACQUIRED BY THE FEDERAL GOVERNMENT IN THE WESTERN PART OF NORTH CAROLINA FOR THE CONSERVATION OF THE NAVIGABILITY OF NAVIGABLE RIVERS.

“Whereas, the Government of the United States, with the consent of the General Assembly of the State of North Carolina, has acquired and will acquire areas of forested land in the western part of said State for the purpose of conserving the navigability of navigable streams, and said lands and waters thereon are and will be stocked, naturally and artificially, with game animals, game and non-game birds, and fish; and

“Whereas, in order adequately to enjoy and protect the occupancy and use of said areas, it is important that the United States be fully authorized to make all needful rules and regulations in respect to such animals, birds, and fish: Therefore,

“THE GENERAL ASSEMBLY OF NORTH CAROLINA DO ENACT:

“Section 1. That the consent of the General Assembly of North Carolina be, and hereby is, given to the making by the Congress of the United States, or under its authority, of all such rules and regulations as the Federal Government shall determine to be needful in respect to game animals, game and non-game birds, and fish, on such lands in the western part of North Carolina as shall have been, or may hereafter be, purchased by the United States under the terms of the Act of Congress of March first, one thousand nine hundred and eleven, entitled ‘An act to enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purposes of conserving the navigability of navigable rivers’ (Thirty-sixth United States Statutes at Large, page nine hundred and sixty-one), and acts of Congress supplementary thereto and amendatory thereof, and in or on the waters thereon.

“In the General Assembly read three times and ratified this 9th day of March, 1915.”

3.

In 1933, by Section 2 of Chapter 537, North Carolina Public Laws of 1933, Chapter 537, page 886, the General Assembly declared the foregoing Act of 1915 should not be construed to deprive the State of its vested right to collect from hunters licenses from hunters on Federal lands in Western North Carolina, said Section being as follows:

"Section 2. That no wording in Section two thousand and ninety-nine, Consolidated Statutes, nineteen nineteen, or any other North Carolina Statute or law, or special act, shall be construed to abrogate the vested rights of the State of North Carolina to collect fees for license for hunting and fishing on any government owned land or in any government owned stream in North Carolina including the license for County, State or non-resident hunters or fishermen; or upon any lands or in any streams hereafter acquired by the Federal Government within the boundaries of the State of North Carolina. The lands and streams within the boundaries of the Great Smoky Mountains Natural Park to be excepted from this act."

4.

"The North Carolina Game Law of 1935," Chapter 486, Public Laws of North Carolina, Session of 1935, page 853, *et seq.*, amended, codified, and reenacted the existing general game laws of the State. Its pertinent provisions are summarized as follows:

(a) Section 2, page 853, defines the unlawful "taking" of "game animals" to "include pursuing, shooting, hunting, killing, capturing, trapping, snaring, and netting" of game animals in the open season, game animals being defined by the Section to include deer.

(b) Section 12, page 860, prescribes stated amounts to be paid for "hunting licenses," forbids the taking of game without a license, and provides that the license shall authorize the taking of game only "during the periods of the year when it shall be lawful."

(c) Section 16, page 864, provides that the open season for the taking of male deer shall be from October 1 to January 1 of each year, subject to changes by the Board of Conservation and Development. In the years here in question no changes in the open season for deer were made by the Board. The law provides no open season for female deer. The Act makes it unlawful to take deer in the closed season.

(d) Section 4(5) authorizes the State game authorities to make cooperative game agreements with the Federal authorities for the development and management of game.

(e) Section 4(c) authorizes the State game authorities to issue permits to kill game animals "which may become seriously injurious to agriculture or other interests in any particular community."

(f) Section 19 makes unlawful the possession or transportation of dead game animals during the closed season.

(g) Section 22 makes it unlawful for any common carrier to transport or receive any game animal for shipment unless the shipper is a licensed hunter, and authorizes a licensed hunter during open season to transport in or out of the State game animals lawfully taken and possessed.

(h) Section 25 provides that violation of any provisions of the law shall be a misdemeanor, punishable as therein provided.

(i) Under the broad powers bestowed by the Act, and as it has been officially interpreted and applied, the State game officials have power to authorize officials of the United States Forest Service to take, trap, possess, ship, or transport deer in or out of season.

5.

In 1939 the General Assembly of North Carolina enacted that its law of 1915, *supra*, now North Carolina Consolidated Statutes, Section 2099, should not be construed as

conveying the State's ownership of game on Federal lands in the State acquired under the Weeks Act or to permit hunting thereon except in accordance with the State Game Law of 1935, which reenacted prior laws, it being as follows:

"AN ACT TO AMEND CONSOLIDATED STATUTES TWO THOUSAND AND NINETY-NINE, VOLUME ONE, ONE THOUSAND NINE HUNDRED AND NINETEEN, RELATIVE TO THE REGULATION OF GAME ANIMALS, GAME AND NON-GAME BIRDS AND FISH ON GAME PRESERVES IN NORTH CAROLINA.

"THE GENERAL ASSEMBLY OF NORTH CAROLINA DO ENACT:

"Section 1. That Consolidated Statutes two thousand and ninety-nine, Volume one, one thousand nine hundred and Nineteen (The Act of 1915, *supra*), be amended by adding a new paragraph at the end thereof to read as follows:

'Nothing in this Act shall be construed as conveying the ownership of wild life from the State of North Carolina or permit the trapping, hunting or transportation of any game animals, game or non-game birds and fish, by any person, firm, or corporation, including any agency, department or instrumentality of the United States Government or agents thereof, on the lands in North Carolina, as shall have been or may hereafter be purchased by the United States under the terms of any Act of Congress, except in accordance with the provisions of Chapter four hundred and eighty-six, Public Laws of one thousand nine hundred and thirty-five.'

"Section 2. Any person, firm or corporation, including employees or agents of any department or instrumentality of the United States Government, violating the provisions of this Act shall be guilty of a misdemeanor and shall be punished in the discretion of the court.

"Section 3. All laws and clauses of laws in conflict with this Act are hereby repealed.

"Section 4. This Act shall be in full force and effect from and after its ratification.

"In the General Assembly read three times and ratified, this the 3rd day of March, 1939."

Federal Laws Involved.

1.

The lands in question were acquired by the United States under the Weeks Act of March 1, 1911, Chapter 186, 36 Stat. 961, Sections 6, 7, 11, and 12, 36 Stat. 961, 962, 963, 16 U. S. C., Sections 515, 516, 521, and 480, the pertinent provisions of which are as follows:

“Chapter 186.—An Act To Enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers.

* * * * *

“Section 6. That the Secretary of Agriculture is hereby authorized and directed to examine, locate, and recommend for purchase such lands as in his judgment may be necessary to the regulation of the flow of navigable streams, and to report to the National Forest Reservation Commission the results of such examinations; Provided, That before any lands are purchased by the National Forest Reservation Commission said lands shall be examined by the Geological Survey and a report made to the Secretary of Agriculture, showing that the control of such lands will promote or protect the navigation of streams on whose watersheds they lie.

“Section 7. That the Secretary of Agriculture is hereby authorized to purchase in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission; Provided, That no deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this Act until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams.

* * * * *

"Section 11. That, subject to the provisions of the last preceding section, the lands acquired under this Act shall be permanently reserved, held, and administered as national forest lands under the provisions of section twenty-four of the Act approved March third, eighteen hundred and ninety-one (volume twenty-six, Statutes at Large, page eleven hundred and three), and Acts supplemental to and amendatory thereof. And the Secretary of Agriculture may from time to time divide the lands acquired under this Act into such specific national forests and so designate the same as he may deem best for administrative purposes.

"Section 12. That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation and administration as national forest lands, except so far as the punishment of offenses against the United States is concerned, the intent and meaning of this section being that the State wherein such land is situated shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State."

2.

Since 1897 Congress has repeatedly enacted and declared that the States should retain their jurisdiction over the game on the lands within the National Forests in their borders and that Federal Forest Officials should aid in the enforcement of State game laws therein, those enactments being as follows:

(a) The Act of June 4, 1897, 30 Stat., pp. 11 to 62, contains at pages 34 to 36 thereof the following provisions:

"All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, * * * and all public lands that may hereafter be set aside and reserved as public forest reserves under said Act, shall be as far as practicable controlled and administered in accordance with the following provisions:

* * * * *

"The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provision of this act or of such rules and regulations shall be punished as is provided for in the Act of June fourth, eighteen hundred and eighty-eight, * * *

* * * * *

"The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State."

(b) The Act of March 3, 1899, 30 Stat., Ch. 423, p. 1074, at 1095, now U. S. Code, Title 16, Sec. 553, provides:

"That forest agents, superintendents, supervisors, and all other persons employed in connection with the administration and protection of forest reservations shall in all ways that are practicable, aid in the enforcement of the laws of the State or Territory in which said forest reservation is situated, in relation to the protection of fish and game."

(c) The Act of March 4, 1907, 34 Stat., Ch. 2907, p. 1256, at p. 1269, now U. S. Code, Title 16, Sec. 553, provides:

"Hereafter officials of the Forest Service designated by the Secretary of Agriculture shall, in all ways that are prac-

licable, aid in the enforcement of the laws of the States or Territories * * * for the protection of fish and game."

(d) The Act of May 23, 1908, Chapter 192, 35 Stat. 251, 259, now U. S. Code Section 553, reenacts the provision in the Act of March 4, 1907, above set forth.

3.

The Pisgah National Game Preserve was established by Presidential Proclamation under the authority of the following portion of the Agricultural Appropriation Act of August 11, 1916, Chapter 313, 39 Stat., 446, 476, now 16 U. S. Code, Section 683, to wit:

"That the President of the United States is hereby authorized to designate such areas on any lands which have been, or which may hereafter be, purchased by the United States under the provisions of the Act of March first, nineteen hundred and eleven (Thirty-sixth Statutes at Large, page nine hundred and sixty-one), entitled 'An Act to enable any State to cooperate with any other State or States, or with the United States, for the protection of watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable streams,' and Acts supplementary thereto and amendatory thereof, as should, in his opinion, be set aside for the protection of game animals, birds, or fish; and whoever shall hunt, catch, trap, willfully disturb or kill any kind of game animal, game or nongame bird, or fish, or take the eggs of any such bird on any lands so set aside, or in or on the waters thereof, except under such general rules and regulations as the Secretary of Agriculture may from time to time prescribe, shall be fined not more than \$500 or imprisoned not more than six months, or both."

**Determination and Authorization of Secretary of
Agriculture.**

The Circuit Court of Appeals sustained the validity of the Determination and Authorization of the Secretary of

Agriculture, dated September 9, 1939, Volume 4, Federal Register, No. 175, page 3883, which reads as follows:

“Determination and Authorization”

“I have considered the information and evidence ad-
duced by the officers of the Forest Service relative to the
conditions of the land and deer herd on the Pisgah National
Game Preserve in the Pisgah National Forest in North
Carolina, established by proclamation of the President
issued October 17, 1916, 39 Stat. 1811, and I hereby find
and determine that the number of deer within the Pisgah
National Game Preserve is so great that they have caused
and are causing serious damage and injury to the land
and forest within the Pisgah National Game Preserve and
I further find and determine that unless the deer herd is
reduced the damage and injury to the land and forest will
continue and grow progressively worse and will result in
further reducing the forage capacity of the Pisgah National
Game Preserve for deer;

Now, Therefore, I, Henry A. Wallace, Secretary of Agri-
culture, pursuant to the authority vested in me by the acts
of March 1, 1911, C. 186, 36 Stat. 961; February 1, 1905,
c. 288, 33 Stat. 628, amendatory of the Act of June 4, 1897,
c. 2, 30 Stat. 11, 35; August 11, 1916, C. 313, 39 Stat. 476;
to effectuate the purpose of those acts do hereby authorize:

“1. Employees of the Department of Agriculture as-
signed to duty on the Pisgah National Forest or persons au-
thorized pursuant to the Regulations of the Secretary of
Agriculture Relating to the Protection, Occupancy, Use
and Administration of the National Forest, published in
the Federal Register of August 15, 1936, to hunt and kill
deer on the Pisgah National Game Preserve and to remove
the carcasses of the deer from the Preserve during the
months of October, November, December, 1939, and Janu-
ary, 1940, or any part of that period designated by the
Chief of the Forest Service;

“2. Employees of the Department of Agriculture as-
signed to duty on Pisgah National Forest to trap, capture
and ship live deer off the Pisgah National Game Preserve

at any time during the balance of the year 1939 and the year 1940 or any part of that period designated by the Chief of the Forest Service;

"Provided, that the deer shall be removed in such numbers and in such manner, and under such conditions as the Chief of the Forest Service shall find necessary for the preservation and protection of the land and forest, the property of the United States.

Given under my hand and the seal of the United States Department of Agriculture, Washington, D. C., this 9th day of September, 1939.

H. A. WALLACE,
Secretary of Agriculture."

Senate Debate on Game Preserve Amendment.

On July 1, 1916, the United States Senate debated the Game Preserve Amendment of August 11, 1916. The Circuit Court of Appeals construed the State Act of 1915, supra —, to grant an exclusive game jurisdiction to the United States and held the debate showed acceptance of such a grant. Portions of the debate are as follows, 53 Cong. Record, page 10, 327-10, 328:

"Mr. Gore. (In charge of the bill.)

"I understand that in North Carolina there is a good deal of depredation in the game in the forest reserves, and to prevent this is really the point to be accomplished by this legislation. * * * The Senator from North Carolina (Mr. Overman) can explain the necessity for this provision more fully and forcefully than I can. * * *

"Mr. Overman.

"I want to say that in the Appalachian Range the Government has acquired what is known as the Vanderbilt Estate. Mr. Vanderbilt has established a game preserve and the only purpose of this amendment is to protect the

game on that Preserve. * * * The land purchased there constitutes a game preserve. The State of North Carolina has given its consent to this legislation; and it is proposed that the President may set aside that land. We have made it general, however, as to the Appalachian Range reservations under the Weeks Bill, because there might be some land just across the line in Tennessee that it would be desirable to cover. * * *

“Mr. Jones.

“Now, there is no suggestion that there is any special need of a game preserve in any of these other places.

“Mr. Overman.

“The Senator from New Hampshire wants it to apply to his State.

“Mr. Jones.

“He simply suggested that the Weeks Law does apply to it. Now, I do not know whether there is any particular need of a game preserve up there or not.

“Mr. Overman.

“I want to say that my amendment that was submitted to the Committee said ‘purchased by the United States in the Western part of North Carolina.’ The Agricultural Committee itself struck that out, so that it might apply to Virginia, Georgia, Tennessee, and New Hampshire and the White Mountains.”



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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 602

J. D. CHALK, COMMISSIONER, DIVISION OF GAME AND
INLAND FISHERIES, DEPARTMENT OF CONSERVATION
AND DEVELOPMENT OF THE STATE OF NORTH CARO-
LINA, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court did not deliver an opinion. Its findings of fact, conclusions of law, and decree appear in the record at pages 67-74. The opinion of the circuit court of appeals (R. 311-318) is reported in 114 F. (2d) 207.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered August 30, 1940

(R. 318). The petition for a writ of certiorari was filed November 30, 1940. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the district court's finding that the Pisgah National Game Preserve is being severely damaged by the presence of an excessive number of deer.

2. Whether, notwithstanding state game laws to the contrary, the United States may protect a National Game Preserve by killing deer and by shipping live deer to other parts of the country.

3. Whether North Carolina has ceded to the Federal Government exclusive jurisdiction over the Pisgah Preserve with respect to the control of the deer in question.

STATUTES INVOLVED

The pertinent provisions of North Carolina Laws 1915, c. 205, and of the Act of August 11, 1916, c. 313, 39 Stat. 446, 476, are set out in the Appendix, *infra*, pp. 10-12.

STATEMENT

The United States brought this suit permanently to enjoin petitioners, officials of the State of North Carolina, from enforcing the state game laws against federal officers and other persons killing and trapping deer on the Pisgah National Game

Preserve pursuant to regulations of the Secretary of Agriculture (R. 48-50).

Under the Weeks Act of March 1, 1911, c. 186, 36 Stat. 961, and with the consent of the state,¹ the United States acquired 150,000 acres in western North Carolina for the Pisgah National Forest (R. 34, 53). In 1915 the state enacted a statute with respect to such lands to the effect that the United States might make "all such rules and regulations as the Federal Government shall determine to be needful in respect to game animals, game and non-game birds, and fish." N. C. Laws 1915, c. 205, N. C. Code Ann. (1939) sec. 2099, Appendix pp. 10-11, *infra*.

By the Act of August 11, 1916, c. 313, 39 Stat. 446, 476, 16 U. S. C., sec. 683, Appendix pp. 11-12, *infra*, Congress authorized the President "to designate such areas on any lands" acquired pursuant to the Weeks Act "as should, in his opinion, be set aside for the protection of game animals, birds or fish." The Act also prohibited hunting or killing wildlife in those areas "except under such general rules and regulations as the Secretary of Agriculture may from time to time prescribe." On October 17, 1916, the President issued a proclamation (39 Stat. 1811) setting aside about 96,000 acres within the Pisgah National Forest as the Pisgah National Game Preserve (R. 34, 53).

¹ N. C. Laws 1901, c. 17 (N. C. Code Ann. (1939) sec. 8057).

Between 1916 and 1925 the number of deer on the Preserve increased from 1,200 to 2,500 (R. 96). Beginning in 1927 the Government endeavored to counteract this increase by trapping and shipping about 200 live deer from the Preserve each year (R. 41, 56). In spite of the Government's efforts the number of the deer increased to over 7,000 by 1935 (R. 125). The result was that the deer severely damaged the lands, forest, and vegetative cover by over-browsing, thus extinguishing some of the most palatable species, greatly reducing the quantity of other species, damaging valuable commercial trees, retarding the normal development of the forest, causing erosion and preventing existing erosion from healing (R. 67-68, 105, 118, 122, 251-257).

Beginning in 1935 federal officers, acting under regulations of the Secretary of Agriculture undertook to reduce the size of the deer herd by conducting annual hunts and by capturing and shipping live deer to other parts of the United States (R. 36-43; 53-57; 68-69). However, petitioners asserted jurisdiction over the hunting, trapping, and transportation of deer from the Preserve (R. 69). Federal officers were arrested and prosecuted under the claim that they were proceeding in violation of the state game laws (R. 41-42, 56).

Thereupon, the United States brought this suit. The District Court granted a permanent injunction finding, among other things (R. 67-68):

2. That the land, forest and vegetative cover comprising said [the Pisgah National Game] Preserve have been and are being severely damaged by the deer on said Preserve.

3. That on September 9, 1939, the Secretary of Agriculture made the following finding published in the Federal Register of September 12, 1939:

"I have considered the information and evidence adduced by the officers of the Forest Service relative to the conditions of the land and deer herd on the Pisgah National Game Preserve in the Pisgah National Forest in North Carolina, established by proclamation of the President issued October 17, 1916, 39 Stat. 1811, and I hereby find and determine that the number of deer within the Pisgah National Game Preserve is so great that they have caused and are causing serious damage and injury to the land and forest within the Pisgah National Game Preserve and I further find and determine that unless the deer herd is reduced the damage and injury to the land and forest will continue and grow progressively worse and will result in further reducing the forage capacity of the Pisgah National Game Preserve for deer;"

4. That the finding of the Secretary of Agriculture as set out in Finding of Fact No. 3 herein, is sustained by the evidence taken in open Court from a host of witnesses and as is fully set out in the record.

The Circuit Court of Appeals concurred in these findings, saying (R. 316):

* * * a study of the evidence leads us to the conclusion that the judge below was clearly right in his finding of fact, that the land, forest and vegetative cover comprising said Game Preserve was being severely damaged by the deer herd. The evidence on behalf of the plaintiff on this question was much more persuasive than that offered on behalf of the defendants and the reasons given for the conclusions reached by the plaintiff's witnesses were much more convincing than those given by defendants' witnesses.

The decision of the district court was affirmed on the ground that the United States had the right to protect its property without interference from the State (relying upon *Hunt v. United States*, 278 U. S. 96), and also upon the ground that, in any event, North Carolina had ceded to the Federal Government exclusive jurisdiction over wildlife on the Pisgah National Game Preserve (R. 316-317).

ARGUMENT

1. The Circuit Court of Appeals concurred in the trial court's finding that the Pisgah National Game Preserve is being severely damaged by an excessive number of deer (R. 67-68, 316). Petitioners seek to have that finding reviewed (Pet. 12, 18, 21-22). To prevail, petitioners must demonstrate that the finding is clearly wrong. They have not sustained

that burden; on the contrary they admit (Pet. 22) that two Government witnesses testified that the deer were causing substantial damage. And in any event the finding is fully supported by the evidence (R. 104-106, 118-122, 125, 251-257; see also p. 4, *supra*). Thus, it is clear that there is no basis for further review.

2. Nor is there doubt as to the correctness of the ruling (R. 316) that the Federal Government has the inherent power to protect its lands from such damage. *Hunt v. United States*, 278 U. S. 96, is directly in point. There the Grand Canyon National Game Preserve had been seriously injured by over-browsing. The Government attempted to reduce the size of the deer herd by killing large numbers of the deer and trapping and shipping live deer to other sections of the United States.² Arizona officials interfered claiming that state game laws were being violated. The United States obtained an injunction against the state officers and this Court affirmed, saying (p. 100):

* * * the power of the United States to thus protect its lands and property does not admit of doubt, *Camfield v. United States*, 167 U. S. 518, 525-526; *Utah Power & Light Co. v. United States*, 243 U. S. 389, 404; *McKelvey v. United States*, 260 U. S. 353, 359; *United States v. Alford*, 274 U. S. 264, the game laws or any other statute of the state to the contrary notwithstanding.

² See Record, *Hunt v. United States*, No. 44, October Term, 1928, pp. 7, 125.

3. The court below further held that the injunction was proper because North Carolina has ceded to the United States exclusive jurisdiction over the control of the wildlife on the Pisgah Preserve (R. 317). Such a cession was clearly within the power of the state, *Collins v. Yosemite Park Co.*, 304 U. S. 518, 529-530, and the 1915 statute is susceptible of no other interpretation. N. C. Laws 1915, c. 205, N. C. Code Ann. (1939) sec. 2099, Appendix pp. 10-11, *infra*. Contrary to petitioners' contention (Pet. 15-16) it is obvious that the state Act of 1901 has no bearing on the question of whether the state ceded jurisdiction over the wildlife in 1915. Likewise the attempts by the state in 1933 and 1939 (Pet. 17-18) to abrogate or repeal the cession of jurisdiction do not amount to a legislative construction of the 1915 Act.

Petitioners further contend that even if the state did cede exclusive jurisdiction over the wildlife (Pet. 16) the Circuit Court of Appeals erred in holding (R. 314-315) that the Act of August 11, 1916, c. 313, 39 Stat. 446, 476; 16 U. S. C., sec. 683, constituted an acceptance of such jurisdiction by the Federal Government. However, it is plain from the language of the 1916 Act (Appendix pp. 11-12, *infra*) and from its legislative history (53 Cong. Rec. 10327) that the United States did accept the grant. Moreover, the Circuit Court of Appeals also held (R. 314) that acceptance of such a grant is presumed. This holding is correct (*Fort*

Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 528;
Mason Co. v. Tax Comm'n., 302 U. S. 186, 207),
and petitioners do not appear to attack it.

It is now urged that there is nothing to show that the size of the deer herd could not have been reduced "by means and within the time allowed by State law" and that the United States should not be permitted to ship live deer outside of North Carolina "in the absence of proof that they could not" be turned over to state game officials "to stock other remote areas in the State" (Pet. 14-15, 19-20, 24). However, petitioners did not advance these arguments in the court below and it is clear from what has already been said that they are without merit.

CONCLUSION

The decision of the circuit court of appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

DECEMBER 1940.

APPENDIX

N. C. Laws 1915, c. 205 (N. C. Code Ann. (1939) sec. 2099) :

AN ACT To give the consent of the State of North Carolina to the making by the Congress of the United States, or under its authority, of all such rules and regulations as in the opinion of the Federal Government may be needful in respect to game animals, game and non-game birds, and fish on lands, and in or on the waters thereon, acquired or to be acquired by the Federal Government in the western part of North Carolina for the conservation of the navigability of navigable rivers.

WHEREAS, the Government of the United States, with the consent of the General Assembly of the State of North Carolina, has acquired and will acquire areas of forested land in the western part of said State for the purpose of conserving the navigability of navigable streams, and said lands and waters thereon are and will be stocked, naturally and artificially, with game animals, game and non-game birds, and fish: and

WHEREAS, in order adequately to enjoy and protect the occupancy and use of said areas, it is important that the United States be fully authorized to make all needful rules and regulations in respect to such animals, birds, and fish: Therefore,

The General Assembly of North Carolina do enact:

SECTION 1. That the consent of the General Assembly of North Carolina be, and hereby is, given to the making by the Congress of the United States, or under its

authority, of all such rules and regulations as the Federal Government shall determine to be needful in respect to game animals, game and non-game birds and fish on such lands in the western part of North Carolina as shall have been, or may hereafter be, purchased by the United States under the terms of the Act of Congress of March first, one thousand nine hundred and eleven, entitled "An act to enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purposes of conserving the navigability of navigable rivers," (Thirty-sixth United States Statutes at Large, page nine hundred and sixty-one), and acts of Congress supplementary thereto and amendatory thereof, and in or on the waters thereon.

In the General Assembly read three times and ratified this the 9th day of March, 1915.

* * * * *

Act of August 11, 1916, c. 313, 39 Stat. 446, 476 (16 U. S. C., sec. 683):

That the President of the United States is hereby authorized to designate such areas on any lands which have been, or which may hereafter be, purchased by the United States under the provisions of the Act of March first, nineteen hundred and eleven (Thirty-sixth Statutes at Large, page nine hundred and sixty-one), entitled "An Act to enable any State to cooperate with any other State or States, or with the United States, for the protection of watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the pur-

pose of conserving the navigability of navigable streams," and Acts supplementary thereto and amendatory thereof, as should, in his opinion, be set aside for the protection of game animals, birds or fish; and whoever shall hunt, catch, trap, willfully disturb or kill any kind of game animal, game or nongame bird, or fish, or take the eggs of any such bird on any lands so set aside, or in or on the waters thereof, except under such general rules and regulations as the Secretary of Agriculture may from time to time prescribe, shall be fined not more than \$500 or imprisoned not more than six months, or both.

